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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

MAX M. LESSER,
Petitioner,
—against—
SERTNER'S, INC.,
Respondent,
—and—
MURRAY SERTNER and PAUL SERTNER, trading as RENOFAB PRODUCTS CO,
Defendants.

No. [redacted] 55

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MICHAEL M. PLATZMAN,
Attorney for Respondent.

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BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The decision of the United States Circuit Court of Appeals for the Second Circuit which is reported in 166 F. (2d) 471 (R. 494-500), reversed a decision of the United States District Court, Southern District of New York, which provided for judgment in favor of petitioner and against Sertner's, Inc. and dismissed the complaint as against the remaining defendants. This opinion is reported at 76 F. Supp. 144 (R. 461-471).

JURISDICTION.

The petitioner seeks to have reviewed the decree of the Circuit Court of Appeals made February 18, 1948 (R. 501). The petition was filed on May 13, 1948, and notice of filing was given to counsel for the respondent on May 21, 1948. Jurisdiction is invoked under Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The only issue is as to whether petitioner was exempted from the provisions of the Fair Labor Standards Act, 29 U. S. C. A. 201 *et seq.*, because he was engaged in a "retail or servicing establishment the greater part of whose selling or servicing is in intrastate commerce."

STATUTES INVOLVED.

Sections 7 and 13(a) of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sections 201 *et seq.*) are here involved:

Section 7 provides:

> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> (1) for a workweek longer than forty-four hours during the first year from the effective date of this section,
>
> (2) for a workweek longer than forty-two hours during the second year from such date, or
>
> (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such an employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 13(a), subdivision (2), provides as follows:

> "The provisions of sections 6 and 7 shall not apply with respect to (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

STATEMENT.

Petitioner is a former employee of Sertner's, Inc., having been employed from January 1940, to March 1944. He was not employed by the remaining defendants.

Petitioner's reference in his petition and brief in support thereof, to employment by Murray Sertner and Paul Sertner, trading as Renofab Products Co., as well as his claim that the employer, Sertner's, Inc., was engaged in producing cleaning fluid (Pet.'s Br. p. 13) should be eliminated from consideration. These issues regarding "Renofab" were determined against him in the District Court and there was no appeal from that determination.

Sertner's, Inc., is engaged in the cleaning, renovating and repairing of upholstered furniture, draperies, rugs and carpets. Petitioner was hired as a shipping clerk. His duties during the period of his employment consisted of the marking, stamping and otherwise handling merchandise; occasionally assisting in loading and unloading of trucks, and preparation of route assignments. He also performed services in relation to the cleaning of furniture.

There is no dispute that respondent's business was a service business.

Petitioner's recitation of "uncontested findings" contains many statements which are merely his own conclusions—as indicated by "6" (Pet.'s Br. p. 4) wherein he states that Sertner's "was operating its premises in the nature of a full fledged factory." The Circuit Court decided that it was not. It is petitioner's contention, and was the basis for the reasoning of the District Court, that although Sertner's, Inc. was

a service establishment, its business was not of a "retail" character. With this the Circuit Court disagreed. The business consisted in the servicing of various types or groups of individuals and companies and involved the cleaning, renovating and repairing of fine fabrics, upholstered furniture, draperies, curtains, rugs and carpets (fol. 1416). The great bulk of this work was performed on the respondent's premises, the work being called for and delivered by the respondent's truck operating in the city.

The following is an admittedly accurate schedule of the types of customers serviced during the years involved in this litigation and the percentage of the total business of the company, conducted with each such type (fols. 1427-1433):

	1940	1941	1942	1943
1. Furniture dealers	.5%	.6%	.5%	.8%
2. Trade shops	.6%	.6%	.75%	.66%
3. Decorators	8.4%	8.8%	8.0%	7.0%
4. Department stores	.6%	.3%	.37%	.66%
5. Commercial consumers	6.0%	7.2%	7.6%	7.9%
6. Institutions	.1%	.16%	.2%	.4%
7. Private residences	83.8%	82.3%	82.5%	82.6%

The great bulk of respondent's customers as appears above, was the private residence consumer. Respondent's interstate business was insignificant and almost non-existent.

One of petitioner's contentions is that Sertner's, Inc. serviced industrial or commercial establishments. The total so serviced did not exceed 7.9% and even if we were to consider them as non-retail in character it falls far short of the 25% set by the Administrator (par. 18 Interpretation Bulletin, No. 6 of Wage and Hour Division of Department of Labor).

Furthermore, it must be pointed out that the record is completely barren of any testimony that any of the "commercial" users of respondent's facilities, were in turn engaged in the production of goods for interstate commerce so as to bring this case within the provisions of the decisions relied upon by the District Court. The only proof that does exist, is that the respondent did service such types of commercial establishments (fols. 1427-1433). What the activities of these commercial establishments were, does not appear in the record, and there is therefore, no evidence that any of the respondent's customers were engaged in any manner whatever, in the production of goods for interstate commerce.

ARGUMENT.

POINT I.

NO QUESTIONS OF SPECIAL GRAVITY OR GENERAL IMPORTANCE ARE RAISED.

The petitioner does not raise any issue which has not been previously passed upon. The issues of law are clear and have been repeatedly ruled upon. Their application does not present any special problem nor are they of such importance as to require a ruling by this Court.

Petitioner's main contentions seem to be:

1. That the employer carried on both a wholesale and retail business and that any such commingling of activities prevents exemption.
2. That the employer's business was of a wholesale type.
3. That solicitation of business on a commission basis changes its character, from retail to wholesale.

POINT II.

EMPLOYER'S NON-RETAIL ACTIVITIES WERE WELL WITHIN THE LIMIT SET BY THE ADMINISTRATOR.

The Circuit Court aptly pointed out herein:

> "When an establishment makes some non-retail sales, the Administrator has ruled that it will nevertheless be considered a retail establishment unless the gross receipts from non-retail sales constitute more than 25 per cent. of the total gross receipts of the establishment."

In the instant case more than 83% of employer's gross receipts were derived from retail sales of service to occupants of private residences. Even if we were to assume that all other sales of service were "non-retail" in character the test has been met.

Petitioner urges (Pet.'s Br. p. 22) that if *any* sales were "non-retail" in character, the employer loses his exemption. He claims that the 75% test applies only when *all* of the sales were directly to the consumer. Obviously, if *all* of its service were rendered directly to the ultimate consumer the question of 75% would never arise. It only comes about where some service is rendered at retail and some at wholesale. Petitioner's claim, therefore, that where the business renders some wholesale service however slight, it cannot claim exemption, is clearly specious.

POINT III.

RESPONDENT'S BUSINESS IS OF A RETAIL CHARACTER.

The accurate test as to whether the exemption should apply is the nature of the employer's customers. Where the customers are ultimate consumers, the Act does not apply.

Roland v. *Walling*, 326 U. S. 657.

Mr. Justice Burton in the *Roland* case, *supra*, said:

> "the exemption reaches employees of only such retail or services establishments as are comparable to the local merchant, corner grocer or filling station operator who sells or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach."

In the instant case it is undisputed that at least 83% of respondent's customers were ultimate consumers beyond the "end of such flow of goods in commerce."

The petitioner also urges that the employer's business was not retail because it didn't have the characteristics of the corner grocer.

Whether or not the business of a service establishment is of a retail or wholesale character must be determined upon the facts in each individual case. The Administrator has merely set down as a guide some of the elements to look for. That plaintiff's business was not confined to the immediate neighborhood where it was maintained, in and of itself would not make it a wholesale business. The department store, which does business with eight or ten cities surrounding it, all within the state, is still considered a retail establishment within the meaning of the exception to the Act. By the very nature of its business it could not be local (in the sense of a few blocks) in character. Yet this Court has included the department store as a type of retailer covered by the exceptions to the Act.

A. H. Phillips, Inc. v. *Walling*, 65 S. Ct. 807.

And similarly, a transportation company which operates throughout an entire state, has been held to be covered by the exemption.

Guess v. *Montague*, 140 Fed. (2d) 500.

The meaning of the word "local" depends naturally upon the nature of the business itself. What is local to a grocery business which draws its trade from an area of a few blocks cannot be local to a service establishment, and what is local to a service establishment cannot be local to a transportation company covering an entire state. Yet they may all be "retail" in character.

Petitioner also claims that the respondent's business was not set up to attract the attention of the consuming public "in the manner usually associated with retail establishments." Surely the local druggist does not attract his consumer in the same way as would the local shop engaged in the repair of automobiles. Yet they are both unquestionably "retail" in character. There can be no doubt however, that the respondent did take steps to attract the attention of the *consuming public*. (See Defts.' Ex. E, pp. 407-410.) Its business was principally with the *consuming public* and not with trade shops and furniture dealers. Its method of attracting such a clientele was not and could not be the same as the method employed by the grocer or automobile repair shop. All must differ. The concern that delivers coal or fuel oil to the homeowner's cellar has no counter, cash register, shelves or "attractive" store, yet he is clearly a retailer.

The respondent's business is servicing private residences by the cleaning of furniture, rugs, fine draperies, etc. The articles are to a great extent bulky in nature. They necessitate trucks for pick-ups and redelivery, and require a great amount of space to perform their service. The grocer would only require a delivery boy with a bicycle and a basket, whereas the respondent requires a truck. The grocer might require a counter to hand over the articles being sold, and the automobile repairman a garage floor with some repair tools, whereas the respondent required a loft with facilities for cleaning.

A member of the consuming public would bring his clothing to the local tailor for pressing and carry it personally, yet the same customer would ask the respondent to come to his home to clean a large and bulky piece of furniture. The record shows that the respondent, as part of the service, takes down the customer's draperies, cleans and rehangs them (see last sheet of Defts.' E. . E, p. 409). Surely this eliminates an "over the counter" transaction. Fundamentally, in all of these businesses a service is rendered and they are "retail" in character.

POINT IV.

PAYMENT OF COMMISSION TO SECURE BUSINESS DOES NOT MAKE IT NON-RETAIL IN CHARACTER.

Petitioner also argues that the business was not retail because, of the service performed for private residences, some was procured through the recommendations of interior decorators, who received a commission for making the recommendation.

Thus, petitioner concludes, the business was of a "wholesale" character.

The conclusion does not follow. The services that were performed, were performed in small quantities, at a retail price, and to a large number of customers for private use. That the business was obtained through the recommendations of decorators, who received a commission, has no bearing on whether or not the work was done for the ultimate consumer.

It is certainly immaterial, from the point of view of the application of the Act, as to the manner in which these customers were obtained. It would make little difference whether the employer advertised for customers, whether it sent canvassers to ring doorbells and paid them a commission for each customer brought it, or whether it obtained some of its customers through the aid of decorators who

recommended the respondent's service establishment and received a commission on all work thereafter done for the customer so recommended. That the employer, where commission was paid to a decorator, dealt at all times directly with the customer, is beyond question. Such decorators acted as agents on behalf of the respondent and under the well established doctrine of principal and agent, the act of the agent was that of the principal.

Ford v. *Grand Union,* 268 N. Y. 243;

Hurley v. *John Hancock Mutual Life Ins.,* 247 App. Div. 547.

The account, therefore, after being referred by the decorator, was that of the respondent, and no distinction can be drawn between the account recommended by a decorator, acting on behalf of the respondent, and one solicited directly by the respondent. It is clearly the *nature* of the business conducted by the respondent that is determinative, and not the manner in which the respondent obtains its business.

These decorators in effect constituted employees of the respondent. Did the business change in nature because its salesmen may have travelled from house to house or have used the telephone instead of remaining behind a counter? Every salesman, whether of service or of a commodity may perform his own function in a different fashion, dependent upon the nature of the commodity he is selling. The retail character of the service did not become wholesale in nature because it employed as "salesmen", "decorators", whose compensation for services was a commission. If the work was done for and billed to the decorator, and in turn billed by him to the local consumer, that would be wholesale; but where the decorator does not get the work, does not fix the price, nor handle the transaction in any way, other than to recommend the service establishment, the transaction does not lose its retail character because the decorator gets a commission.

POINT V.

CONCLUSION.

The jurisdiction of this Court to review judgments and decrees of the Circuit Court of Appeals is exercised sparingly and then only in cases of peculiar gravity and general importance. The legal questions presented here are elementary. The determination of the Circuit Court of Appeals is in accord with existing decisions. There has been no misinterpretation of the Federal Statutes. Its decision conflicts neither with law announced by other Federal Courts nor with the general weight of authority.

FOR THE FOREGOING REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL M. PLATZMAN,
Counsel for Respondent.

Dated: June 14, 1948.